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No. 88-1981

In the Supreme Court of the United States

OCTOBER TERM, 1989

FRANK DERANGO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a person may be convicted under 21 U.S.C. 848 and 18 U.S.C. 2 for aiding and abetting a continuing criminal enterprise.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A2-A3) is unpublished, but the judgment is noted at 873 F.2d 1443 (Table). The order of the district court (Pet. App. A4-A5) is unpublished. An earlier opinion of the court of appeals is published at 740 F.2d 505.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 4, 1989. The petition for a writ of certiorari was filed on June 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners

were convicted of aiding and abetting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 and 18 U.S.C. 2; aiding and abetting a drug conspiracy, in violation of 21 U.S.C. 846 and 18 U.S.C. 2; conducting the affairs of an enterprise through a pattern of racketeering activity (RICO) and conspiring to commit that offense, in violation of 18 U.S.C. 1962(c) and 1962(d); and extortion, in violation of 18 U.S.C. 1951. The court of appeals affirmed but remanded for resentencing. 740 F.2d 505 (1984). This Court then denied certiorari. 472 U.S. 1017 (1985). On remand, petitioners were sentenced as follows: Petitioners DeRango, Pena, and Smentek were sentenced to concurrent terms of 12 years' imprisonment without parole on two CCE counts, to concurrent terms of 18 years' imprisonment on the RICO counts and one or more of the extortion counts, and five years' probation on the remaining extortion counts. Petitioners DeSimone and Eatman were sentenced to concurrent terms of ten years' imprisonment with parole on one CCE count and one RICO count, and five years' probation on the other counts against them.[1] Petitioners subsequently filed a motion, pursuant to 28 U.S.C. 2255, seeking vacation of their CCE convictions. The district court denied the motion, Pet. App. A4-A5, and the court of appeals affirmed, Pet. App. A2-A3.

The evidence at trial showed that petitioners, all former Chicago police officers, protected two large drug distributorships in Chicago's Marquette district over a three-year period. Specifically, petitioners warned the distributors of impending raids and of the presence of

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[1] Petitioners William Guide and William Haas are not proper parties before this Court, inasmuch as they were not parties to the appeal below. Their sentences, however, were similar to those imposed on petitioners DeRango, Pena, and Smentek.

honest police officers in the area; they failed to arrest the distributors or their employees and ignored complaints from citizens about the activities of the distributors; they caused cases against the distributors or their employees to be dismissed in state court by writing false arrest reports; they seized narcotics from competing narcotics operations and delivered them to the distributors; they beat up and threatened to kill a drug dealer who was competing with the distributors; and they diverted addict traffic from competing operations to the distributors. In exchange for their efforts on behalf of the protected distributors, petitioners received money, weapons, and other things of value. 740 F.2d at 507; Tr. 801-1162, 2973-3250.

2. Petitioners' CCE convictions rested on the theory that they had aided and abetted the kingpins in running the drug enterprise. At trial, petitioners unsuccessfully moved to dismiss the CCE count on the ground that the aiding and abetting statute, 18 U.S.C. 2, does not apply to a CCE offense.

On appeal, the court of appeals likewise rejected this contention. The court observed that the kingpin's non-supervisory employees—such as runners, mixers, and lookouts—could not be punished as aiders and abettors because that would undermine Congress's purpose of providing "differential punishment for the kingpin." 740 F.2d at 507. In concluding that petitioners could be so punished, however, the court reasoned that they were "not the kingpins' employees, but the kingpins' police protectors." *Id.* at 508. The court explained (*ibid.*):

> Congress probably would have wanted [the kingpin's police protectors] to be punishable, in an appropriate case, as severely as the kingpins themselves. It is difficult for a large illegal enterprise to flourish without official protection; and the large revenues that such

> enterprises earn * * * enable them to dangle attractive bribes before policemen and other officials. The effectiveness of the kingpin statute might therefore be reduced if a kingpin's police protectors, such as [petitioners], whose efforts enable large drug enterprises to flourish brazenly for years, could never be punished as aiders and abettors.

The court went on to hold, however, that the district judge had erred in assuming that aiders and abettors of a CCE offense are subject to the mandatory minimum sentence provision of the CCE statute.[2] Accordingly, the court remanded for resentencing to allow the district judge to decide if he wanted to punish petitioners as severely as he would have to do if they were the kingpins themselves. 740 F.2d at 508-510.[3]

3. Following the Second Circuit's decision in *United States* v. *Amen*, 831 F.2d 373 (1987), cert. denied, 108 S. Ct. 1573 (1988), that a defendant could not be convicted of aiding and abetting a continuing criminal enterprise, petitioners filed a motion, pursuant to 28 U.S.C. 2255, seeking vacation of their CCE convictions. The district court denied the motion, stating that it was bound by the court of appeals' earlier opinion in this case. Pet. App. A4-A5. The court of appeals summarily affirmed, Pet. App. A2-A3, holding that the case was controlled by its decision in *United States* v. *Pino-Perez*, 870 F.2d 1230 (1989) (en banc), petition for cert. pending, No. 88-7142.

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[2] The minimum penalty for the kingpin is ten years' imprisonment without parole. 21 U.S.C. 848(a).

[3] The court of appeals also vacated petitioners' convictions under 21 U.S.C. 846, on the ground that Section 846 is a lesser included offense of Section 848. 740 F.2d at 510.

In *Pino-Perez*, the Seventh Circuit, sitting en banc, rejected the contrary view of the Second Circuit in *United States* v. *Amen*, and held that a CCE conviction could be based on an aiding and abetting theory. The court held that the aiding and abetting statute, 18 U.S.C. 2, applies to the entire criminal code, and that nothing in the legislative history of the CCE statute forecloses its application to that statute. 870 F.2d at 1233-1234. The court concluded that although "the persons supervised by the kingpin cannot be punished as aiders and abettors," *id.* at 1231, a person who was not a member of the enterprise, but who "participate[d] in" the venture as "something that he wishes to bring about" and who sought "by his action to make it succeed," is liable under 18 U.S.C. 2. 870 F.2d at 1235. The court also overruled that portion of its prior decision in this case that persons who aid and abet a CCE are not subject to the mandatory minimum penalties provided by 21 U.S.C. 848. 870 F.2d at 1236-1237.

ARGUMENT

Petitioners contend (Pet. 7-14) that their CCE convictions must be reversed because CCE convictions may not be obtained on an aiding and abetting theory. The issue whether the aiding and abetting provision, 18 U.S.C. 2, applies to 21 U.S.C. 848 is currently pending before this Court in *Pino-Perez* v. *United States*, No. 88-7142. As we explained in our brief in opposition in that case, nothing in the language of 21 U.S.C. 848 or 18 U.S.C. 2 supports the view that it is impossible to aid and abet a violation of 21 U.S.C. 848. Rather, with some exceptions not pertinent here, the aiding and abetting statute is "applicable to the entire United States criminal code." *Breeze* v. *United States*, 398 F.2d 178, 192 (10th Cir. 1968). See also, *e.g.*,

United States v. *Lennon*, 751 F.2d 737, 741 (5th Cir.), cert. denied, 471 U.S. 1100 (1985). While petitioners do not qualify as drug kingpins, the group specifically targeted by the CCE statute, it is settled that persons who are not members of the class at which a particular criminal statute is directed can nonetheless be held liable for a violation of the statute on an aiding and abetting theory. See *Standefer* v. *United States*, 447 U.S. 10 (1980).

Despite the contrary conclusion by the Second Circuit in *United States* v. *Amen*, nothing in the legislative history of 21 U.S.C. 848 dictates a different result. Although Section 848 in its original form was merely a sentencing enhancement provision, it was ultimately enacted as a separate substantive offense, to which aider and abettor liability automatically attaches. Our arguments on these points are fully set out in our brief in opposition in *Pino-Perez* (at 4-8) and will not be repeated here.[4]

In the present case, as in *Pino-Perez*, it was not unduly harsh to hold petitioners accountable as aiders and abettors. As the court of appeals noted on direct review of this case, petitioners were the kingpins' police protectors, "whose efforts enabled large drug enterprises to flourish brazenly for years." 740 F.2d at 508.

Notwithstanding the conflict between the court below and the Second Circuit in *Amen*, the present case does not warrant further review by this Court. As we explained in our brief in opposition in *Pino-Perez* (at 8-9), the question presented is not likely to be one of recurring importance. *Pino-Perez* is the only other case now pending that raises the same issue. No other circuits have addressed the issue, and there is no reason to believe that any will be confronted with the question in the future. Because the

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[4] We are providing petitioners with a copy of the government's brief in opposition in *Pino-Perez* v. *United States*.

Department of Justice now advises federal prosecutors not to charge violations of the CCE statute on an aiding and abetting theory, few, if any, similar prosecutions are likely to be commenced in the future.

Nor would reversal in this case be likely to affect the period of incarceration served by any of the petitioners. Petitioners DeRango, Pena, and Smentek received no-parole sentences on their 12-year CCE convictions, but they were given longer, concurrent sentences on the racketeering and extortion counts (18 years). Under those circumstances, it is unlikely that they would be subject to release under their 18-year sentences before the expiration of their no-parole CCE sentences, which will likely be reduced to approximately 8 years by the accrual of statutory good time. As for petitioners DeSimone and Eatman, the district court directed that they would be eligible for parole under their 10-year CCE sentences, and they received concurrent 10-year terms on their RICO convictions.[5] Accordingly, even if their CCE convictions were vacated, it would not affect the period of time they would be imprisoned.[6] Moreover, if petitioners' CCE convictions

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[5] Under current Seventh Circuit law, the district court would not have been permitted to direct that DeSimone and Eatman would be eligible for parole, but the earlier mandate of the court of appeals permitted parole-eligible sentences for aiders and abettors under CCE. The district court imposed such sentences on DeSimone and Eatman, and the government did not seek further review of those sentences.

[6] The Bureau of Prisons informs us that petitioners Eatman and DeSimone will be eligible for release after serving their full sentences (minus credit for good time) in February 1991; they were denied early release on parole. The 12-year no-parole sentences imposed on petitioners DeRango, Pena, and Smentek will terminate on April 6, 1992, after credit for good time. While they would theoretically be entitled to parole release on their 18-year sentences as early as April 1991, they

were vacated, they would all be subject to resentencing on the conspiracy count that was vacated as a lesser included offense of the CCE counts. Because the district court was not required to impose mandatory minimum sentences on the CCE counts, the court presumably sentenced each petitioner to the total term of imprisonment that the court believed was appropriate in light of that petitioner's conduct. It is therefore unlikely that the court would alter the total period of incarceration for any petitioner upon substituting a sentence imposed under Section 846 for the sentences imposed under Section 848.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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are not likely to be granted early parole on those sentences, even if their CCE sentences are vacated.

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